STATE OF MICHIGAN

COURT OF APPEALS

HRT ENTERPRISES,

Plaintiff-Appellant,

and

MERKUR STEEL SUPPLY, INC., MERKUR TECHNICAL SERVICE, AND STEEL ASSOCIATES, INC.

Plaintiff,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
July 24, 2007

No. 268285
Wayne Circuit Court
LC No. 02-240493-CC

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff HRT Enterprises, which is owned by Karl Thomas and Hein Rusen, appeals as of right a judgment entered upon a jury's verdict of no cause of action in favor of defendant, City of Detroit, in this inverse condemnation action. We affirm.

HRT purchased real estate located in the city of Detroit commonly known as "11111 and 11118 French Road" in 1983.[1] The property is located across French Road from Detroit City Airport. French Road runs parallel to existing Runway 15/33. The property is approximately 11 acres in size and contains an existing building that is approximately 188,000 square feet in size.

[1] HRT leased the property to Merkur Steel Supply, Inc, which had its offices in the front part of the existing building. Merkur Steel in turn subleased portions of the property to Steel Associates, Inc., which occupied a portion of the offices in the existing building as well as most of the plant portion of the existing building. Merkur Steel bought and sold steel that was stored, processed, or tested by Steel Associates. Karl Thomas and Hein Rusen own or control HRT, Merkur Steel, and Steel Associates.

The front of the existing building is located approximately 525 feet from the centerline of Runway 15/33 and is within the "building restriction line"[2] imposed under Federal Aviation Administration (FAA) regulations. However, the airport has been operating under a waiver from the FAA with regard to the building since 1972. The waivers were renewed in 1988, but the city was expected to take appropriate action by "removing, lowering, relocating, marking or lighting, or otherwise mitigating these airport hazards . . ." The city proposed to acquire properties and eliminate structures to clear an area 750 feet from the existing runway centerline when it acquired FAA funds to do so. According to the FAA, applications to fund such a proposal are considered "on a priority needs basis."

In 1991, the Detroit city council approved acquisition of land surrounding the airport to remove any existing hazards on the property near the airport. The city did in fact condemn some of the properties in the area.[3] However, the FAA did not provide federal funds to the project in an amount sufficient to allow the city to condemn HRT's property. Because the city did not know if or when it would receive FAA funding, the city advised HRT in 1992, in response to a letter from Rusen:

> Until such time as you receive a duly authorized written notification of the City's intent to acquire your property, you should proceed to conduct your business as dictated by sound business judgment. . . .
>
> * * *
>
> In the event all relevant procedures are complete and the necessary approval obtained, the City still must identify a funding source for acquisition of property and/or improvements to Detroit City Airport. Accordingly, the City cannot predict with any reasonable degree of certainty, the time from for acquisition, if any, of your properties.[4]

The airport expansion did not occur, nor did funding for acquisition of the property. Plaintiff brought this action in inverse condemnation against defendant city of Detroit, alleging that the filing of the airport layout plan and the threat of potential condemnation of the property affected its property so adversely as to amount to taking without just compensation.

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[2] The building restriction line is an imaginary line that identifies a clear area 750 feet from the existing runway centerline.

[3] The city focused its efforts first on an area known as the "mini-take" area, which consisted of residential properties considered to be less compatible uses.

[4] The city also advised property owners in the vicinity of the airport, through a series of community newsletters, that the city's master plan update "does not mean that the airport will be expanded. The master planning process provides a 'roadmap' with possible directions for future development – it does not guarantee that the Airport will be expanded." Thus, the city advised property owners to "maintain their property in the best possible condition."

I

Plaintiff first argues that it was denied a fair trial because the trial court imposed time limits on the parties' examination and cross-examination of witnesses. We disagree.

This lawsuit initially involved three plaintiffs[5] and was consolidated for trial with another lawsuit involving Steel Associates only. On November 3, 2003, the plaintiffs in the consolidated cases filed an "Emergency Motion to Eliminate Arbitrary Time Limits on Examination and Cross-Examination of Witnesses." In that motion the plaintiffs objected to the court's imposition of a one-hour time limitation on examination of witnesses. Plaintiffs asserted, "Because two consolidated cases are being tried together, Plaintiffs should be permitted additional time to present the evidence for both cases."

Trial was set for November 5, 2003. On that date, the trial court granted defendant's motion for summary disposition[6] in the present lawsuit and proceeded to trial on the Steel Associates lawsuit only. Before trial on the Steel Associates lawsuit commenced, however, the trial court denied the motion to eliminate the time limits. The court indicated that it would allow examination of three hours for Mr. Thomas, two hours for Mr. Rusen and expert witnesses, and one hour for lay witnesses.

Ultimately, this Court reversed the order granting summary disposition in favor of defendants and the case was remanded. The trial court granted HRT's motion to proceed to trial on HRT's claims only. There is no indication in the record that HRT objected to any time limitations imposed by the trial court. Because plaintiff did not object to the imposition of time limits at trial, the issue is unpreserved, and appellate relief is not available absent plain error affecting plaintiff's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MRE 611 grants a trial court broad power to control the manner in which a trial is conducted, including the examination of witnesses. *Hartland Twp v Kucykowicz* 189 Mich App 591, 595; 474 NW2d 306, 308 (1991). MRE 611(a) states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment

The mode and order of admitting proofs and interrogating witnesses rests within the discretion of the trial court. *Moody v Pulte Homes, Inc,* 423 Mich 150, 162, 378 NW 2d 319 (1985).

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[5] HRT, Merkur Steel, and Steel Associates.

[6] As pertinent to the present case involving HRT, the trial court found that the circuit court lacked jurisdiction over HRT's claims. On appeal, however, this Court reversed and remanded. The case proceeded to trial on HRT's claims only.

Here, the record reveals that the trial court limited HRT's redirect examination of two witnesses. The court denied HRT's request to ask "two more questions" of Marsha Bruhn, the director of the City Planning Commission, and to question Dean Nitz, the airport's District Office Manager for the FAA in Detroit.

While HRT asserts the time limitations were arbitrary and unnecessarily restricted the elicitation of relevant testimony, it fails to delineate what testimony was precluded from presentation. A party may not merely announce a position on appeal and then leave it to this Court to discover and rationalize the basis for the claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). The record does not indicate that the trial court abused its discretion in limiting the time available to both counsel for presentation of proofs. See *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415-416; 516 NW2d 502 (1994), abrogated on other grounds, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 56 nn 8; 684 NW2d 320 (2004).

HRT also argues that the trial court deprived it of a fair trial by "misinforming the jury about the length of the trial" and "abusing the jurors' time by starting hours late each day." Specifically, HRT argues that the trial court told the jury "trial would take three days." However, a review of the transcript reveals that, at the conclusion of voir dire and preliminary jury instructions, the trial court stated to the jury:

> Okay, we're gonna stop here for the day, and every morning I have pretrial conferences and other cases, so you don't have to come in until 10:00 tomorrow. . . . And then you won't be here on Friday, because we have motions on other case. It's not a trial day, so you'll be here tomorrow and then Monday and Tuesday probably.

On another occasion, a juror expressed a scheduling conflict, and the parties and the court indicated their willingness to accommodate the juror.

Contrary to HRT's suggestion, there is no evidence in the record to support a finding that the jury became biased against HRT as a result of the length of the trial or any delays in the trial. HRT's argument is speculative and without merit.

II

HRT next argues that it is entitled to a new trial because the trial court failed to give the jury HRT's special instructions on futility, deliberate acts, and impact of the announcement of the airport expansion project.[7] We disagree. A trial court's decision regarding jury instructions is reviewed for an abuse of discretion. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). This Court reviewed the instructions in their entirety and will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice. *Id.*

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[7] Although HRT's brief also refers to an instruction on unreasonable delay, a review of the record reveals no request for such an instruction.

HRT's argument that it was entitled to an instruction on futility is premised solely on this Court's decision in *Steel Associates, Inc v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2005 (Docket No. 254025). In *Steel Associates*, this Court affirmed the jury's finding that the city of Detroit inversely condemned the plaintiff's leasehold interest in the property. In discussing the city's argument that the plaintiff itself did not apply for a building permit, tall structures permit, or FAA hazard determination, this Court stated:

> The fact that plaintiff did not "personally apply" for these permits was not material because it was clear from the evidence that the city was not going to permit any new construction or remodeling on the property. The law does not require the doing of a futile or useless act.

This Court's decision in *Steel Associates* did not concern jury instructions; hence, HRT's reliance on the decision is misplaced.

HRT's argument that it was entitled to an instruction on the definition of deliberate acts is premised on this Court's decision in *Merkur Steel Supply, Inc v City of Detroit*, 261 Mich App 116; 680 NW2d 485 (2004). There is no dispute that the trial court instructed the jury that an element of a claim for inverse condemnation is that the city "engaged in deliberate actions toward the property that, in fact, interfered with the plaintiff's property rights." HRT contends that the court should have given the jury an instruction that defined the term "deliberate acts" as "the published threat of condemnation, mailing letters concerning the project to area residents, refusing to issue building permits for improvements coupled with intense building inspection, reductions in city services, and protracted delay and piecemeal condemnation." *Merkur Steel, supra* at 128. Contrary to HRT's suggestion, *Merkur Steel* did not concern jury instructions and merely stated examples of what may constitute deliberate acts. Indeed, the quoted language above is derived from *Detroit Bd of Ed v Clarke*, 89 Mich App 504, 509; 280 NW2d 574 (1979), in which this Court further explained:

> However, more than mere promulgation and publicizing of plans is needed in Michigan to constitute a taking. Threats must be coupled with affirmative action such as unreasonable delay or oppressive conduct directed to the neighborhood as a whole. . . . Threats of condemnation and any action in furtherance thereof should be considered cumulatively in determining whether an unlawful taking has occurred.

Clearly, the trier of fact must consider all of the evidence when determining whether a governmental agency engaged in deliberate acts. Consequently, the trial court properly refused to give an instruction containing a list of what constitutes deliberate acts.

HRT also argues that it was entitled to a jury instruction based on MI Civ JI 90.15, which is required in condemnation cases. The standard jury instruction provides:

> [A] change in value directly traceable to the prospect of condemnation should not penalize either owners or the public. By the same token, you should disregard any increases in value which may have occurred by reason of the prospect of the completion of the project.

HRT maintains that the value of the property should have been considered without regard to the effect of the city's announcement of its plans to acquire the property. HRT fails to cite any authority in support of its position that the instruction is applicable in an inverse condemnation case. Nonetheless, the instruction at issue is relevant to a determination of market value, an issue that the jury never reached because the jury determined that the city did not inversely condemn HRT's property. The jury instructions, when read in their entirety, fairly and adequately presented the theories of the parties and applicable law to the jury. *Case v Consumers Power Co.*, 463 Mich 1, 8; 615 NW2d 17 (2000).

III

HRT argues that it was deprived of a fair trial by defense counsel's misconduct. HRT raised this same issue in a motion for a new trial, which the trial court denied. A trial court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). A new trial may be granted for, among other things, "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial," or "[m]isconduct of the jury or of the prevailing party." MCR 2.611(A)(1)(a) and (b).

In *Reetz v Kinsman Marine Transit Co.*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court set forth the following rules for analyzing an attorney misconduct claim:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

Furthermore, an attorney's comments during trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402, 412 (2003).

HRT first asserts that defense counsel improperly told the jury that HRT's owners moved from Michigan to Florida in 1992 to make them appear to be a "couple of rich owners" in an attempt to bias the jury against them. We disagree. A review of the record reveals that defense counsel's comments were made in response to the testimony of Thomas and Rusen that they were involved in the day-to-day business activities of their companies and that they witnessed the decline of the area and the criminal activity in the area. Thus, the comments were not improper. *Sudul v City of Hamtramck*, 221 Mich App 455, 504; 562 NW2d 478 (1997).

HRT also asserts that the city's attorney made an improper argument about HRT's motive for bringing this lawsuit. We disagree. One of HRT's arguments at trial was that the city's refusal to issue a building permit to HRT or its tenants resulted in a taking of HRT's property. In response to this argument, the city presented evidence that the city was never given the opportunity to formally approve or deny a building permit because HRT did not file final building plans or pay the necessary fees, which are prerequisites to a determination by the city with regard to a request for a building permit. The city also presented evidence that HRT's agent informed HRT that the building permit would be issued when the prerequisites were satisfied. In light of this evidence, the argument that HRT did not really intend to construct its proposed expansion was a proper comment on the evidence.

Next, HRT maintains that the city's attorney improperly emphasized the city's financial situation to the jury in an attempt to prejudice the jury against HRT. We disagree. Contrary to HRT's argument, the city's attorney did not ask the jurors to "think as taxpayers, not as impartial jurors." Although the city attorney did question witnesses regarding the city's budget deficit and financial condition, the questions were in response to HRT's questions regarding the city's budget and the city's failure to purchase HRT's property. Indeed, during his closing argument, HRT's counsel stated:

> Look at it this way. Mr. Chamberlain told you he thinks the property is worth five million dollars. The city's budget, you've heard, is at least two billion dollars a year. Five million is one hundredth of one percent of the money that the city has in its budget since 1990. A drop in the bucket in the overall picture. Five million is a lot of money, yes. But, the city could have bought this property along the way. . . .

The questioning was clearly in response to HRT's counsel's questioning and therefore was improper.

HRT also argues that the city's attorney encouraged the jury to "ignore the Court's jury instructions, to ignore the evidence, and to simply return a no cause verdict because it would take less time and allow them to go home sooner." We disagree.

During his closing argument, HRT's counsel placed the jury verdict form on the projector and instructed the jury on which sections it should mark to render a verdict in favor of HRT. In his closing argument, defense counsel engaged in similar conduct, instructing the jury that "if you vote no [on the verdict form], the next sentence says, if the answer to question number one is no, you don't have to go any further. You can go home . . ." Defense counsel's comment on the verdict form did not encourage the jury to "simply return a no cause verdict because it would take less time" as suggested by HRT.

Similarly, defense counsel's statement that "I don't care what the other juries did. I want you to make your decision based on what you've heard in this case . . ." did not suggest to the jury that it should ignore the judicially noticed facts. Rather, defense counsel properly advised the jury to make its decision based on the evidence presented in this case, which included these facts.

HRT also argues, without citation to case authority and without elaboration, that defense counsels' statement that "I don't know why it takes that many [twenty-one] witnesses to prove your case, because if it does, you don't have a case," contravened the following instruction to the jury:

> Although you may consider the number of witnesses testifying on one side or the other, when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

Where a party merely announces a position without providing authority, this Court ordinarily considers the issue waived, as we do in this case.. *Yee v Shiawassee Co Bd of Comm'rs,* 251 Mich App 379, 406; 651 NW2d 756 (2002).

IV

HRT contends that it was entitled to a new trial because the jury's verdict was against the great weight of the evidence. A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon,* 456 Mich 625, 639, 642; 576 NW2d 129 (1998). The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

It is in the trial court's discretion to grant or deny a new trial. *Harrigan v Ford Motor Co*, 159 Mich App 776, 788; 406 NW2d 917 (1987). On appeal, this Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent unique qualification to assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988); *Kochoian v Allstate Insurance Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988).

Inverse condemnation requires a showing of two necessary elements. *Hinojosa v Dep't of Nat'l Resources*, 263 Mich App 537, 549; 688 NW2d 550 (2004). The plaintiff must first prove "that the government's actions were a substantial cause of the decline of its property." *Id.* Second, the plaintiff must "establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id.*

At HRT's request, the jury was told that it must accept as conclusive the fact that a jury decided that the city inversely condemned part of Merkur Steel's leasehold interest in the property, as well as the fact that a jury decided that the city inversely condemned Steel Associates' leasehold interest in the property, by preventing the construction of an addition to the existing building. Without any legal analysis of the elements of a cause of action for inverse condemnation or factual analysis of the evidence presented in *this* case, HRT asserts that, in light of the facts regarding the tenants' lawsuit, the jury in the present case was required to find that the city interfered with HRT's property rights. Because defendant does not argue the merits of

this claim it is considered abandoned. *People v Kent,* 194 Mich App 206, 210; 486 NW2d 110 (1992). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). While HRT cursorily asserts that the verdict was against the great weight of the evidence, our exhaustive review of the record reveals that there was competent evidence to support a finding that the city's actions were not a substantial cause of the decline of HRT's property and that the city did not abuse its legitimate powers in affirmative actions directly aimed at HRT's property.[8]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[8] HRT presents an argument in its brief in which it asserts that "the city is liable for de facto taking of HRT's property rights." This argument was not presented in the statement of questions presented. An issue not contained in the statement of questions presented is waived on appeal. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004).